

Matthew G. Bevin
Governor



Hal Heiner
Secretary
Education and
Workforce Development Cabinet

Stephen L. Pruitt, Ph.D.
Commissioner of Education

KENTUCKY DEPARTMENT OF EDUCATION

300 Sower Boulevard • Frankfort, Kentucky 40601
Phone: (502) 564-3141 • www.education.ky.gov

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Submitted Via Federal eRulemaking Portal: www.regulations.gov

Mr. James Butler
U.S. Department of Education
400 Maryland Avenue, SW, Room 3W246
Washington, DC 20202

RE: Comments for Agency Docket ID: [ED-2016-OESE-0056-0001] *Notice of Proposed Rulemaking Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act - Title I - Improving the Academic Achievement of the Disadvantaged - Supplement Not Supplant*

Dear Mr. Butler:

The Kentucky Department of Education (KDE) has reviewed the United States Department of Education's (USED) Notice of Proposed Rulemaking (NPRM) on Title I – Improving the Academic Achievement of the Disadvantaged – Supplement Not Supplant under the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA), which was published in the Federal Register on September 6th of this year.

The purpose of this letter is to transmit KDE's comments regarding the proposed regulations on supplement not supplant contained within the NPRM.

Items Within the ESSA Proposed Rulemaking with Which We Agree

KDE shares ESSA's vision and USED's commitment to investing adequate resources for all students to receive a high-quality education and ensuring fiscal accountability. KDE also shares ESSA's vision to ensure that the most disadvantaged students – regardless of income, race, handicap, disability, or native language – are not disenfranchised.

Kentucky has continuously pursued efforts to close educational achievement gaps. In that vein, Kentucky has dedicated funding and implemented a number of programs to realize a high-quality education for all students. One of the largest programs Kentucky has implemented in the last two years is Novice Reduction for Gap Closure. This is a comprehensive strategy that includes:

- *Helping schools and districts implement specific strategies to address the high percentage of novice students.*
- *Providing specific support around reading and numeracy programs.*
- *Assisting the lowest performing schools in the state through extensive instructional and financial supports.*
- *Providing support for positive behavioral interventions to address student behavior that interferes with learning.*
- *Providing support for culturally responsive instruction.*
- *Addressing educator quality through efforts with postsecondary preparatory programs and professional development.*
- *Focusing on accountability and incentives for schools, districts, and educators to help move novice students to higher levels of performance.*

Under ESSA, Title I continues to provide financial assistance to local educational agencies (LEAs) and schools with high percentages of children from low-income families to help ensure that all children meet challenging state academic standards. Supplement not Supplant is intended to ensure that schools with high numbers of poor students do not receive less state and local funding due to participating in Title I.

Highlighting how funding is distributed provides valuable information to parents, educators and taxpayers. More importantly, transparency should support accountability and ensure that the commitment to adequate funding, equitably distributed, is pursued with fidelity and that the programs that are funded by federal, state or local tax revenue actually work toward improving the education of our children.

Items Within the ESSA Proposed Rulemaking with Which We Have Concerns

While the statute's intent to promote equitable funding is clear, the proposed rule complicates these efforts severely by limiting the ability of local and state education agencies to dedicate necessary revenues as needed and implement needed programming to address achievement gaps.

Item 1 – USED's Interference in State and Local Education Funding Authority

Statutory Summary: 20 U.S.C. 6321(b)(4) prohibits the Secretary of Education from prescribing the methodology a LEA may use to allocate State and local funds to each school. U.S.C. 7372 prohibits mandating equalized spending per pupil for a State, LEA or school.

The proposed regulation would: Mandate that Title I schools receive no less state and local funding than non-Title I schools. The guidance provided by USED also explicitly states that local districts are expected to spend roughly equal amounts of state and local revenue per pupil in Title I and non-Title I schools.

Comment:

The methodology change to Supplement not Supplant under ESSA requires school districts to explain how funds are distributed across their schools and to demonstrate that state and local funds are not reduced due to a school receiving extra federal dollars due to a school's Title I status. This is a significant departure from the previous Supplement not Supplant compliance requirements under No Child Left Behind (NCLB), which simply required districts to show that they used Title I money to support additional expenditures without regard to how state and local funds were distributed among schools.

It is understood that requiring a resource allocation methodology is meant to prevent any Title I school from getting less state and local money than it would have if it did not participate in Title I. USED's interpretation goes beyond ESSA's requirements and expects local districts to spend roughly equal amounts of state and local revenue per pupil in Title I and non-Title I schools. Therein lies the issue. The authority to distribute local and state educational funding lies, rightly, with local and state government. ESSA does not provide the U.S Department of Education with the legal authority to mandate parity in local and state expenditures between Title I and non-Title I schools. This provision ignores the authority vested in state and local education agencies to fund and allocate monies in support of a multitude of varied instructional programs to promote educational attainment.

Beyond the question of legal authority, the requirement that each LEA, without exception, spends an amount of state and local funds per pupil in each Title I school that is equal to or greater than the average amount spent per pupil in non-Title I schools completely ignores how local school finance and school-based budgeting works.

Kentucky's funding formula, Support Education Excellence in Kentucky (SEEK), provides a per pupil base guarantee. Regardless of where you live in the state, every child receives a set minimum per pupil amount based on the state General Fund and local required effort. This ensures a base level of services across the state and for every student. Kentucky's funding formula also provides add-on funds for those most at-risk: students with disabilities; students in poverty; English language learners; and those confined to home and hospital for a short illness. As a result, each qualifying child in the state attending public schools also is guaranteed additional funding to support his/her additional needs. Under the benchmarks established in the proposed rule, it is difficult to determine if this funding mechanism – which many states have emulated – would meet the requirements outlined in the proposed rule.

Item 2 – Shifting the Emphasis from Supporting Educational Activities to Education Funding

Statutory Summary: 20 U.S.C. 6321(b)(2) requires the LEA to demonstrate that it uses a methodology to distribute state and local funds to schools receiving Title I assistance to ensure that such schools receive all the state and local funds they would receive if they were not receiving Title I funds. 20 U.S.C. 6321(b)(3) prohibits requiring an LEA to identify a cost or service as supplemental or requiring the provision of services through a particular instructional method or setting to demonstrate compliance.

The proposed regulation would: Shift from a focus on activities that are supplemental to a review of funding levels to ensure equity in local and state funding to Title I and non-Title I schools. To comply, the LEA must annually publish its methodology demonstrating the distribution of state and local funds to ensure proper funding of Title I schools. (*Section §200.72(b)(1)*)

Comment:

One of the difficulties created by the proposed rule is that it creates a system entirely based on funding benchmarks at the district level. It is important to note that Kentucky has been concerned with funding equity since the passage of the Kentucky Education Reform Act (KERA) of 1990. SEEK is a funding formula that attempts to provide for equitable school funding across Kentucky. In this case, it appears Kentucky is ahead of the curve. In the proposed rule, equity is viewed solely through levels of funding as

opposed to actual need, which could be used to hide misuse and ultimately defeat the intent of this provision.

Use of funding benchmarks as the sole consideration for the determination of equity creates ample opportunity for potential misuse of funds. There is plenty of reference to need and quality through structures such as required needs assessments in Title I programming in an effort to provide real change for the students with highest needs. However, there is not a direct measure of the use of those funds toward the goals of Title I. It tends to operate as a blank check with concern for funding levels overriding students' actual needs.

The stated goal of the rule is more equity; however, it would result in less accountability toward that goal. Since educational effectiveness is not addressed and distribution of funding is the only measure valued under the proposed rule, it could create a free-for-all situation where districts are able to purchase freely without justification, pulling that money away from its intended use—to address potential inequity in Title I schools. Examples from the field include situations where districts have sought to buy items remotely or items totally unrelated to a plan to address inequity in Title I schools. There also have been attempts to employ individuals not necessarily qualified for a district position through Title I funds. While the intent of the proposed rule isn't to harm the most economically disadvantaged in our society, it could inadvertently and negatively impact schools, especially for the poorest students.

The centralized nature of this framework also would collide with Kentucky's commitment to local control, specifically with regard to school-based decision making (SBDM). The SBDM council establishes school level policy consistent with district policy and is responsible for determining, within the parameters of allocated funds, the number of persons to be employed in each job classification at the school. If funding considerations are based solely on funding benchmarks, the specific needs of each school are not addressed thereby undermining the SBDM council's ability to serve its school's identified needs.

The proposed rule also does not define whether the prior or current year funding level is the subject of review. If this system is based on current year funding, then it requires a "real-time" assessment of equity, which proves difficult as district level financial situations can be fluid, making compliance a real difficulty. There also is no discussion of recourse for non-compliance or required action where a district falls out of compliance.

Considering the stagnant economy and the reduction in state revenues since 2008, the possibility that new or increased revenue would be available to keep local districts from spending down is unlikely. The largest expenditure in any local school district is for personnel – primarily teachers. Not just in Kentucky, but across the country, this could have serious implications for staffing, tenure, placement of teachers with content specialty, and even collective bargaining agreements.

According to the National Center for Education Statistics (NCES), thousands of Title I eligible schools do not have a majority of students receiving free lunch while thousands of non-Title I schools have more than half their students eligible for free lunch. This may encourage districts to concentrate poor students in Title I schools rather than break up concentrated poverty, as is obviously the case now.

Item 3 – Ambiguous Required Methodologies that are Inconsistent with Statutory Intent

Statutory Summary: 20 U.S.C. 6321(b)(1) requires that a state educational agency (SEA) or LEA use Federal funds only to supplement the funds that would, in the absence of such federal funds, be made

available from state and local sources for the education of students participating in programs assisted under Title I, and not to supplant such funds. 20 U.S.C. 6321(b)(4) prohibits the Secretary from prescribing any specific methodology that an LEA must use to allocate state and local funds to schools receiving Title I funds.

The proposed regulation would: Require LEAs to use one of four methodologies to demonstrate equitable allocation of state and local funds. (Section 200.72(b)(1)) The methodologies include distributing almost all state and local funds based on: (1) a per pupil funding formula, (2) a districtwide personnel and non-personnel resource funding formula, (3) a peer reviewed SEA funds-based compliance test, or (4) the “special rule” which permits districts to show compliance through a methodology where per pupil state and local spending in Title I schools is equal to or greater than average spending in non-Title I schools.

Comment:

Given the complexity of each methodology, and several undefined terms within, we will address the methodologies and undefined terms separately below.

The first three methodologies are subject to a provision that requires the LEAs to allocate “almost all” state and local funds before utilizing Title I funds. The proposed rule does not provide guidance as to what is considered “almost all,” creating real uncertainty for district use of funds. Currently, districts are not directed to allocate any specific portion of their total funds to schools. If the “almost all” provision is not defined, KDE will have to provide a definition as leaving this to the individual districts could result in anything from a 51% interpretation to 99%. Under the proposed rule, there is more direction for state and local funds than there is for federal funds. Districts currently enjoy the ability to allocate set-asides or rainy day funds, allowing them to create somewhat of an insurance policy for future needs. This flexibility is especially important in districts without much financial flexibility that must anticipate large expenses due to aging facilities and other district needs. Under the proposed rule, there is no guidance that requires the use of every Title I dollar the district is allocated. This could result in huge carry-over amounts. Furthermore, if districts are not permitted to allocate set-asides because of the “almost all” language, they will most certainly set-aside using the Title I dollars, entirely defeating the intended purpose.

Methodology 1, based on characteristics of students for per pupil allocation, much resembles the notion of Kentucky’s state level SEEK formula, but is created at the district level. SEEK is a funding formula that includes a base calculation for per pupil spending with add-ons for students with particular needs. There are several difficulties with this method. This method permits the LEA to create its own formula, allowing the district to assign certain weights to add-on groups, including students living in poverty, English learners, students with disabilities, and potentially other groups that the LEA considers associated with disadvantage. This would require districts to undertake a complex process to determine an appropriate formula which could create additional costs for the district as this would be an entirely new way of demonstrating equitable allocation. As Kentucky has 173 local school districts, this creates the opportunity for 173 different, complex methodologies which could result in lower overall transparency, a key goal of ESSA.

Methodology 2, based on personnel and non-personnel resources, also is subject to the “almost all” language described above. This methodology appears to be much more attractive to Kentucky’s smaller

districts where there are fewer schools, personnel, and resources to consider. This could present difficult situations for larger districts that must consider a larger range of costs for personnel and non-personnel resources. As an example, generally there is a larger population of less experienced teachers in some Title I schools versus non-Title I schools. The difference between the average funding and that associated with a Title I school could be significant, requiring the reallocation of staff or other resources based on nothing but a funding amount rather than actual need. Further, there are questions regarding the meaning of “salary” and what exactly is included in that calculation (e.g., benefits, substitute teachers, etc.).

Methodology 3 allows for the creation of a state-created methodology. This would require KDE to create a federally peer-reviewed methodology which, once created, is not required for use by LEAs. While the notion of a state-created methodology grounded in a locally driven perspective is appreciated by KDE, it is highly unlikely that this would be utilized. The proposed rule does not provide a framework by which the methodology would be tested to determine whether or not it is “as rigorous as the approaches” defined above, nor is there a definition for “funds based,” leaving the entire structure up to interpretation but yet subject to review under an undefined standard.

Methodology 4 is considered the “special rule,” which allows an LEA to demonstrate compliance when it spends an amount of state/local funds per pupil in Title I schools that is equal to or greater than the average per-pupil amount in non-Title I schools. Under the special rule, LEAs are permitted an annual variance in spending of not more than 5% less at Title I schools, and schools with less than 100 students may be excluded from calculations. The proposed rule includes a flexibility that permits the exclusion of non-Title I schools from compliance calculations when such a school serves a “high proportion” of students with disabilities, English learners or high-poverty students, and those services disproportionately impact LEA spending at that school. The school may be excluded from the LEA’s calculations when the services disproportionately impact spending, and the LEA would be in compliance but for such an expensive non-Title I school. The proposed rule fails to define what constitutes a “high proportion” of covered students. The lack of a definition is problematic because it is unknown which schools would be eligible for exclusion. The lack of clarity will lead to inconsistent application across districts and the states.

The proposed rule provides four distinct methodologies that include a series of undefined terms and standards that could be interpreted differently across the state as well as the nation. This will lead to inconsistencies and provide shareholders with conflicting information regarding the method of allocation as well as how those funds are actually utilized. This is especially troubling because transparency should serve as a guardrail.

Education is the great equalizer. It provides opportunity to all regardless of income or race, handicap or disability, or to those who cannot speak or write English. While not guaranteeing that everyone will receive the same outcome – nor should it – education is the agent by which everyone can access the tools needed to be successful individuals and citizens. The proposed rule, as well intended as it may be, interferes with state and local authority, and creates incentives that may actually weaken support for at-risk students and muddies rather than enhances funding transparency. Kentucky proudly denies no one educational opportunity. As such we oppose initiatives that complicate our work and potentially disenfranchise the very populations we seek to bolster.

Thank you for the opportunity to provide the Kentucky Department of Education's views on the proposed regulation. Please contact me at any time to discuss the content of this letter further.

Sincerely,

A handwritten signature in blue ink that reads "Stephen L. Pruitt". The signature is written in a cursive style with a large, stylized "S" and "P".

Stephen L. Pruitt, Ph.D.
Kentucky Commissioner of Education